

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 448865
Issued to: Earl Louis NELSON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2052

Earl Louis NELSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 19 December 1974, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's license for three (3) months outright upon finding him guilty of negligence and misconduct. Under the charge of negligence the specifications found proved allege that while serving as pilot aboard the M/V GEORGE PRINCE under the authority of the license above captioned, on 4 February 1974 Appellant wrongfully failed to (1) keep out of the way of a privileged vessel in a crossing situation, (2) timely slacken speed, stop, or reverse to avoid collision with a privileged vessel in a crossing situation, (3) keep a proper lookout, and (4) adequately utilize electronic navigational equipment available to him for the purpose of effecting a safe passage across the Mississippi River at about mile 120.7 above Head of Passes, all of which contributed to a collision between the M/V GEORGE PRINCE and the M/V F. R. BIGELOW and tow. Under the charge of misconduct the specification found proved alleges that while serving as pilot aboard the M/V GEORGE PRINCE under the authority of the license above captioned, on 4 February 1974 Appellant wrongfully failed to sound a one whistle signal as required by 33 U.S.C. 344, while in a condition covered by that section. A second specification under the charge of misconduct, alleging that Appellant failed to sound the danger signal as required by 33 U.S.C. 344, was found not proved by the Administrative Law Judge.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of three witnesses and several documents.

In defense, Appellant offered in evidence his own sworn testimony, the testimony of seven witnesses, and several documents.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charges and specification, except for the second specification of charge two, had been proved. He then served a written order on Appellant suspending Appellant's license for a period of three (3) months outright.

The entire decision and order was served on 23 December 1974. Appeal was filed on 31 January 1975 and, although not within the time prescribed in 46 CFR 5.30-1(a), is deemed to be timely filed. The delay in filing the notice of appeal can be attributed to an Administrative error in dating the letter of transmittal for the Decision and Order.

FINDINGS OF FACT

The detailed evidentiary findings set forth by the Administrative Law Judge at pages 2-5 of the Decision and Order are affirmed and adopted. The following is a brief summary of those findings.

On the morning of 4 February 1974 Appellant was the person in charge of the GEORGE PRINCE, a 120 foot diesel ferry operating between Luling and Destrehan, Louisiana, on the Mississippi River. Appellant was the holder of a Coast Guard first class Pilot's license limited to the established ferry route between Luling and Destrehan and at all pertinent times was acting under the authority of that license.

At 0540 the GEORGE PRINCE departed the west bank landing at Luling on a routine crossing. At the same time the F. R. BIGELOW flotilla, consisting of the tug F. R. BIGELOW pushing nine barges ahead, was proceeding upriver at some point near the east bank a short distance downstream from the east bank ferry landing at Destrehan. At 0550 the lead barge of the F. R. BIGELOW flotilla collided with the GEORGE PRINCE. The collision occurred a few hundred feet from the east bank of the river.

Until just before the collision the GEORGE PRINCE proceeded on a normal crossing and the F. R. BIGELOW maintained her upbound course and speed. The normal crossing carried the GEORGE PRINCE across the bow of the F. R. BIGELOW'S lead barge. Although the F. R. BIGELOW was showing her navigational lights and sounding various

whistle signals, Appellant did not notice her until immediately prior to the collision. None aboard the GEORGE PRINCE was assigned the specific duty of lookout. The operator of the F. R. BIGELOW made several attempts to contact the GEORGE PRINCE by radio prior to the collision and, although the GEORGE PRINCE was equipped with a VHF marine radio in working condition, he was unable to raise her. The only whistle signal sounded by the GEORGE PRINCE prior to the collision was a one blast signal sounded as she departed from the west bank ferry landing.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Essentially Appellant raises two issues on appeal. First he urges that the proceedings were unduly biased against him. In support of this contention he cites several actions of the Investigating Officer, including his failure to bring charges against the operator of the F. R. BIGELOW, that allegedly show that the Investigating Officer was only interested in "persecution" and not in the "preservation of justice." Secondly Appellant contends that the charges and specifications were not sufficiently proven. This is supported mainly by an attack on the credibility of the Investigating Officer's witnesses.

APPEARANCE: Jones, Walker, Waechter, Poitevent, Carrere and Denegre; Fred E. Salley and John J. Broders, of counsel.

OPINION

I

Appellant makes several allegations of impropriety in various portions of his brief that he urges have so tainted the proceedings before the Administrative Law Judge that all charges must be dismissed. In sum these allegations amount to a charge that the Investigating Officer was unduly prejudiced against Appellant. In this respect Appellant cites (1) the Investigating Officer's attempts to proceed with the hearing prior to Appellant obtaining representation by profession counsel, (2) an alleged close working relationship between the Investigating Officer and Counsel for Ingram Barge Co., the owner of the barge involved in the collision, and (3) the fact that the operator of the F. R. BIGELOW was not charged. None of these contentions merit extended discussion.

With respect to the first, it is sufficient to note that the Administrative Law Judge exercised his discretion and postponed the hearing until Appellant obtained counsel. Thus Appellant could not have suffered any prejudice. However, it should be pointed out

that, as Appellant had been given proper notice of the hearing, the Investigating Officer was not acting improperly by moving to proceed at the appointed time.

The second point raised by Appellant consists of unsupported assertions of fraud, conspiracy, and collusion on the part of the Investigating Officer. Since he has not chosen to cite any evidence or portion of the record to substantiate these assertions, they cannot serve as a basis for appeal. See 46 CFR 5.30-1(e). In my examination of the record I have found no evidence of impropriety on the part of the Investigating Officer.

Appellant's third point, which he argues shows bias on the part of the Investigating Officer, is the failure to charge the operator of the other vessel. As I have stated many times, the alleged negligence of others cannot serve to excuse negligence on part of a respondent. Additionally, the mere fact that the Investigating Officer chose to charge only Appellant, rather than both parties, does not show prejudice. There are a variety of reasons in a particular case why a party may not be charged. The decision to charge is left to the discretion of the Investigating Officer and nothing in this record shows he abused that discretion.

II

Next Appellant contends that the charges and specifications were not sufficiently proven. It should first be pointed out that the quantum of proof required to support a finding in these administrative proceedings is substantial evidence of a reliable and probative character. 46 CFR 5.20-95(b). Appellant's mention of other test, such as proof "to a degree sufficient in civil litigation," and his attempt to characterize the proceedings as "quasi criminal" are irrelevant. His major thrust, however, is an attack on the credibility of the Investigating Officer's witnesses. Unless Appellant can show clear and convincing error, the Administrative Law Judge's findings, when based on a determination of the relative credibility of conflicting testimony, must be upheld. It is settle beyond dispute that determinations regarding the credibility of witnesses are particularly within the discretion of the trier of fact.

In consideration of the totality of Appellant's arguments, I specifically find that there is sufficient evidence of a reliable and probative nature to support the findings of the Administrative Law Judge.

III

Although not raised by Appellant as a point of appeal, I

recognize that both charges and the underlying specifications are somewhat multiplicitious. Essentially Appellant's error, his negligence and misconduct, was his failure to observe a tow that he plainly should have seen. This was charge as several specifications of actions he should have taken had he been aware of the tow. Since Appellant has not complained of the matter in which the charges were framed, no correction is necessary. It is important to note, however, that the sanction imposed by the Administrative Law Judge is considered appropriate even in light of the multiplicitious nature of the specifications.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 19 December 1974, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 22nd day of March, 1976.

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